United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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75-7324

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DAVID L. SALISBURY	)	
Plaintiff - Appellant	)	CIVIL APPEAL
vs	)	DOCKET NO. 75 - 7324
The SOUTHERN NEW ENGLAND TELEPHONE	)	
COMPANY, INC., and WILLIAM J. O'KEEFE	)	
Defendants - Appellees	)	

REPLY BRIEF OF PLAINTIFF - APPELLANT

On Appeal From The United States District Court

For The District Of Connecticut

DAVID L. SALISBURY

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Plaintiff - Appellant

vs

The SOUTHERN NEW ENGLAND TELEPHONE COMPANY, INC., and WILLIAM J. O'KEEFE

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For The District Of Connecticut, Zampano, J.

REPLY BRIEF OF PLAINTIFF - APPELLANT

ARGUMENT

I.

IN CONSIDERING A MOTION TO DISMISS, A PLAINTIFF MUST BE GIVEN OPPORTUNITY TO PRESENT ARGUMENT AGAINST DISMISSAL FOR FAILURE TO STATE A CAUSE OF ACTION.

A. Due Process Requires Notice Of The Issues To Be Considered And Opportunity To Be Heard.

In the case at bar, the defendants argue in their brief, that the plaintiff was afforded minimal Due Process by the District Court in its

contemplation of the defendants' Motion To Dismiss Upon Reconsideration. They further allege that the two motions to dismiss raised all the issues that the Court subsequently decided and both parties were entitled, and in fact did brief the issues presented to the Court.

This statement needs clarification to present the true picture to this Court. In the defendants' original motion to dismiss, the Hon. Robert C. Zampano, Judge, stated in his ruling on that motion, " The only issue posed by the defendants' motion to dismiss is whether termination of the service constitutes 'state action'". (Ruling on Motion to Dismiss, App. Doc. No. 12, Page 1).

Thereafter, defendants filed a motion for Summary Judgment which was denied by Judge Zampano. However, in his ruling on that motion, Judge Zampano granted leave for the defendants to file a motion to reconsider the motion to dismiss in view of the action taken by the Supremem Court in Jackson vs Metropolitan Edison Company, 419 U.S. 345.

In essence, the Supreme Court in Jackson, Supra, held that Metropolitan Edison Company in Pennsylvania did not operate under color of law when it terminated Mrs. Jaskson's electric service, and therefore Mrs. Jackson failed to state a cause of action under 42 U.S.C. § 1983.

Therefore, the only issue to be decided upon reconsideration given by Judge Zampano in view of Jackson, Supra, was whether Public Utilities in the State of Connecticut, and the defendant Southern New England Telephone Company in particular, act under color of law in terminating utility service, to the extent that those acts would bring them within the scope of 42 U.S.C. § 1983. See Record from the District Court, Doc. 33, Ruling on Summary Judgment, P. 4. Defendants were given leave to submit a Motion To Reconsider Motion To Dismiss, with a supporting brief, within 20 days, and plaintiff was given 14 days to

respond to the defendants' motion. No other opportunity was afforded the parties to address this issue. The motion was never placed on the Motion Calendar. The motion was decided without any hearing or opportunity to be heard.

The Courts have held that, " A Plaintiff must **not** be denied opportunity to present argument against dismissal for failure to state cause of action". Vazquez vs Litton Industries Leasing Corp., et als, 67 F.R.D. 117. (1975), No. 4, p. 118, 120.

A plaintiff has a right to be heard, which includes the right to submit a written statement. Jordan vs County of Montgomery, Pennsylvania, et als, 404 Fed 2d, 747, 748. (CCA 3 1969). Implicit in this ruling is the fact that not only is a plaintiff entitled to submit a brief, but that the plaintiff must be given an opportunity to present oral argument.

It is respectfully submitted that the District Court erred in not affording plaintiff at least an opportunity to argue this motion to dismiss upon reconsideration on the Motion Calendar, and that therefore, plaintiff was effectively denied due process.

B. The District Court Gave No Notice That It Would Consider Any Issue Other Than The Issue Of State Action As Raised By The Supreme Court Ruling In The Jackson Case.

As we have seen, the District Court, in granting leave for the defendants to file a motion to reconsider their motion to dismiss, with a supporting brief, in view of the principals set forth in the Supreme Court ruling in Jackson, Supra, gave no notice, gave no hint or inkling that the Court would consider any issue other than the issues posed in Jackson, Supra, in relation to actions brought under 42 U.S.C. § 1983.

The District Court, of its own volition, in its original consideration on defendants' original Motion To Dismiss, held that the only issue posed was whether the defendants had acted under color of law in terminating plaintiff's telephone service. By so ruling, the District Court left intact all of plaintiff's other claims under 42 U.S.C., §§ 1985, 1986 and 1988. In granting leave to reconsider Motion To Dismiss, no mention was given of plaintiff's claims under 42 U.S.C. §§ 1985, 1986 and 1988. And, contrary to defendants' arguments in their brief, these particular issues were not briefed by the parties. Nor was there reason to inasmuch as the defendants in making their motion only requested reconsideration in view of the principals set forth in Jackson, Supra, and made no mention of plaintiff's other claims under 42 U.S.C. §§ 1985, 1986 and 1988. (Motion To Reconsider Defendants' Motion To Dismiss, App., Doc. No. 34, p. 1.)

In Literature, Inc. et al., vs Quinn, et al., 482 Fed 2d, 372, 374, (CCA 1, 1973), the Court held (2) " Court may not dismiss complaint on its own motion without giving plaintiffs notice of proposed action and affording them opportunity to address issue". Also, in Lawson vs Prasse, et al., 411 Fed 2d, 1203, (CCA 3, 1969), the Court stated on p. 1204, " We have also pointed out in a number of cases that it is desirable that actions such as this be permitted to proceed in the customary manner and that a plaintiff should have an opportunity to be heard on the legal questions involved in the determination whether his complaint should be dismissed".

In the instant matter, the District Court gave no notice of its intention to dismiss plaintiff's claims under 42 U.S.C., §§ 1985, 1986 and 1988, gave no opportunity to be heard, and these issues were not briefed. Therefore, plaintiff was denied minimal Due Process in this respect, and these claims should be remanded to the District Court for proper consideration.

C. The District Court, In Its Ruling On Defendants' Motion To Dismiss Upon Reconsideration, Raised A New Issue For The First Time.

The District Court, in its ruling on the defendants' Motion To Dismiss Upon Reconsideration, raised a new question not previously presented. Nor was the issue raised by the Supreme Court in Jackson, Supra, in its consideration or ruling in that matter.

That issue is the partnership relationship between the State of Connecticut and the defendant, Southern New England Telephone Company, a joint venture mandated by § 16-49 of the Connecticut General Statutes.

The District Court in granting leave to the defendants to file their motion to reconsider their motion to dismiss, and the District Court, in considering that motion, gave no notice, gave no clue, that it would ponder, and then decide, upon speculation, rather than on fact, that because the State of Pennsylvania has an expense sharing arrangement, similar in some respects to that of the State of Connecticut, that this expense sharing plan did not provide the nexus for a showing of "State Action". As we shall see later, the Supreme Court did not consider the expense sharing arrangement provided by Pennsylvania Statute 66 § 1461. If this factor had been considered by the Supreme Court in Jackson, Supra, it is extremely likely that an entirely different ruling would have resulted. However, for the District Court to have determined that Connecticut's expense sharing Statute did not provide the nexus for"State Action", on the basis of a law, similar in some respects to one in Pennsylvania, but not considered by the Supreme Court, was error.

In Dodd vs Spokane County, Washington, et als., (CCA 9, 1968) the Court held, (3), " District Court had right to invoke on its own motion rule permitting dismissal of complaint for failure to state claim for relief, if the proper procedural steps were taken and determination was correct on the merits".

Plaintiff respectfully submits that in the present matter, the proper procedural steps have not been taken, and the determination was not correct.

The proper procedural steps were not taken, because no notice was given, nor was opportunity presented to argue the fact that Pennsylvania has an expense sharing Statute. Plaintiff pleads that C.G.S. § 16-49 which provides for utilities to share in the expenses of the P.U.C. to the extent of 56 % of those expenses, is an index of "State Action". Plaintiff has consistently urged this position and briefed the same. However, although Pennsylvania has an expense sharing arrangement, it was never considered by the Supreme Court, and therefore, can have no bearing on the impact of the Jackson ruling on Connecticut utilities. If the District Court had held an evidentiary hearing on this issue, it would have been possible to bring witnesses before the Court to testify to this fact. (The Supreme Court Records and Briefs in the Jackson case were apparently not available in this area until late this fall, not in time for argument in the District Court.) It cannot be said now, that the proper procedural steps were taken, when, upon closer examination, it must appear that the District Court speculated that the Supreme Court considered this index of "State Action".

Nor can the determination be considered correct when based upon speculation rather than fact. It is not for the Court to speculate on the nature and weight of the evidence which the parties may produce at trial. Commerce Oil Refining Corporation, vs Miner, et al., 22 F.R.D. 5, 6. (1958).

In view of the above, plaintiff respectfully requests this matter be remanded to the District Court for proper proceedings. It is patent that

the District Court had only one issue before it in considering the defendants' Motion To Dismiss Upon Reconsideration. No opportunity was offered to present testimony, documents or other evidentiary matter to resist the motion. No opportunity was given to argue questions of law. No notice or opportunity to argue was offered plaintiff in considering the issues raised under plaintiff's claims under 42 U.S.C. §§ 1985, 1986 and 1988. The District Court gave no notice, or opportunity for any hearing on the issue of Pennsylvania's Public Utility expense sharing Statute, 66§ 1461, although the District Court assumed without evidence that the Supreme Court considered that Statute in deciding the Jackson case. Consequently, it is crystal clear that the plaintiff was not afforded even minimal Due Process by the District Court when the Court dismissed the action without an evidentiary hearing.

ARGUMENT

II

THE DISTRICT COURT ERRED IN HOLDING THAT THE CONDUCT OF PUBLIC UTILITIES IN THE STATE OF CONNECTICUT, AND IN PARTICULAR, THE DEFENDANT, THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, DOES NOT CONSTITUTE STATE ACTION UNDER 42 U.S.C.§1983.

A. <u>All Of The Indicia For A Finding Of State Action Have Been Alleged By The Plaintiff In His Complaint</u>.

In the landmark case, <u>Burton vs Wilmington Parking Authority</u>, 365 U.S.715, the Supreme Court stated on page 722, " . . . to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "This Court has never attempted."

However, many Courts have cited several factors, some or all of which may be required to be present for a finding of "State Action". An example is the list of factors deemed to be relevant by Judge Kerner in Kadlec vs Illinois Bell Telephone Co., 407 Fed2d,624,628 (CCA 7, 1969).

An examination of plaintiff's Complaint reveals that all of the factors necessary for a finding of "State Action", have been alleged. (Complaint, App, Doc. No. 1, pages 2 through 4.) For the convienence of the Court and the parties, we reiterate these indicies below and the appropriate authorities that recognize or require them.

1. Complaint, App. Doc 1, Count I, paragraph 5, page 2, alleges the authority for the organization and creation of the defendant Telephone Company. Also paragraph 8 of the same count on pages 3 and 4. Paragraph 5 is admitted by the defendants in their answer and paragraph 8 is denied. However, for the purposes of a motion to dismiss, all allegations well pleaded are deemed admitted. They are presumed to be true. Cruz vs Beto, 405 U.S. 319. This index of "State Action" by private parties who are clothed with state authority and act with the force of law has been recognized in:

United States vs Williams, 341 U.S. 97,(1950)

United States vs Price, 383 U.S. 787, (1965)

United States vs Guest, 383 U.S., 745, (1965)

Griffin vs Maryland, 378 U.S. 130, (1964)

2. Complaint, App. Doc. 1, Count 1, paragraph 6, pages 2 and 3, alleges that the defendants are subject to comprehensive regulation in all aspects of its activities and operation. In their answer, defendants admit these allegations, and the District Court found that this was true. In paragraph 8 of the same count, plaintiff details many of the factors of this regulation and control. This type of regulation has been recognized in the following:

Public Utilities Comm'n vs Pollak, 343 U.S. 451, (1952)

Burton vs Willmington Parking Authority, Supra,

Moose Lodge vs Irvis, 407 U.S. 163, (1972)

Smith vs Allwright, 321 U.S., 649, (1944)

Terry vs Adams, 345 U.S. 461, (1953)

3. Complaint, App. Doc. No. 1, Count 1, paragraph 8, pages 3 and 4, alleges in detail how private action is regulated, encouraged, compelled or taken under state law, custom or usage, or reflects current state policy. This index of "State Action" has been recognized in:

Reitman vs Mulkey, 387 U.S. 369. (1969)

Adickes vs Kress, 398 U.S. 144, (1970)

Moose Lodge No. 107 vs Irvis, Supra,

Peterson vs City of Greenville, 373 U.S. 244, (1963)

Lombard vs State of Louisana, 373 U.S. 267, (1963)

Robinson vs Florida, 378 U.S. 153, (1964)

Nixon vs Condon, 286 U.S., 73, (1932)

McCabe vs Atchison, Topeka & Santa Fe R. Co., 235 U.S. 151, (1914)

Evans vs Abney, 396 U.S. 435, (1970)

Shelley vs Kraemer, 334 U.S. 1, (1948)

4. Complaint, App. Doc. No. 1, Count 1, paragraph 7, page 3, alleges that the defendants perform a vital public function, as an agent of the State of Connecticut. In New York City Jaycees, Inc. vs United States Jaycees, Inc., 512 Fed2d, 856, (CCA 2, 1975), on p. 857, the Hon. Judge Hayes held; (6)

> "Under 'Public function' doctrine, whereby private persons performing certain functions traditionally reserved to the state may become subject to constitutional restrictions, service involved must not only be one which is traditionally exclusive prerogative of state, but it must in addition be one which state itself is under affirmative duty to provide."

See also, Holodnak vs Avco-Lycoming Division, 514 Fed2d. 285,(CCA 2, 1975)

In Magill vs Avonworth Baseball Conference, et al, 516 Fed2 1328, it was held that private, individual conduct may be found to constitute state action (1) where state courts enforce an agreement affecting private parties, (2) where the state 'significantly" involves itself with the private party and, (3) where there is private performance of a gove.ment function .

It has long been recognized that the furnishing of utility services is a public function, often undertaken directly by the governmental body itself, and in other cases the governmental body endows a private party or group with the power to perform this public service. See Note: " Constitutional Safeguards for Public Utility Customers", 48 NYU L. Rev. 493, (1973). Public function means that the grantee is about the public's business. It is doing something the state deems useful for the public necessity or convienence. Boman vs Birmingham Transit Co., 280 Fed2d, 531, 535,(CCA 5 1960). Courts have found that the furnishing of utility services was a public function and therefore constitute an important index of "State Action". See Bronson vs Consolidated Edison of New York, 350 F. Supp. 443, (S.D.N.Y., 1972): Stanford vs Gas Service Co., 346 F. Supp.717, (D. Kan.,1972); Davis vs Weir, 328 F. Supp. 317, 359 F. Supp. 1023, (N.D. Ga., 1971): Palmer vs Columbia Gas of Ohio, Inc., 479 Fed2d, 153, (CCA 6, 1973); Ihrke vs Northern State. Power Co.,459 Fed2d, 566, (CCA 8, 1972) cert. granted, vacated as moot, 34 L. Ed2d, 72, 1972.

In the State of Connecticut, the Public Service Commission does not furnish utility service itself, but it does have the duty and power to see to it that the private companies it controls do furnish this service. See Connecticut General Statute § 16-20.

Additional authority holding that "State Action" may be found in private action involving the performance of traditional public functions delegated to private individuals may be found in Terry vs Adams, Supra; Nixon vs. Condon, Supra; Evans vs Newton, 382 U.S. 296, (1966); Marsh vs Alabama,326 U.S. 502(1946).

5. Complaint, App. Doc. No. 1, Count 1, paragraph 8, page 3, alleges the exclusive monopoly status of the defendant Southern New England Telephone Company. In their answer, the defendants deny this. For the purposes of the Motion To Dismiss, it is deemed to be true. Also, in their brief, they admit they have, (but not guaranteed), a certain monopoly position. (Def Br. page 9.) It is respectfully submitted that the question of whether this monopoly is guaranteed is irrelevant, at least for the purposes of this appeal. This monopoly status enjoyed by the defendant company, although not a determinative factor by itself in a finding of "State Action', is without question an important index in a cumulative series of factors that must lead to an inescapable conclusion that Connecticut utilities operate under color of law in their daily operations. See the following authorities.

Railway Employes' Dept. vs Hanson, 351 U.S. 225, (1956)

International Ass'n of Machinists vs Street, 367 U.S. 740,(1961)

Lathrop vs Donahue, 367 U.S. 830, (1961)

Steele vs Louisville & N. Ry., 323 U.S. 192,(1944)

American Communications Ass'n vs Douds, 339 U.S. 382, (1950)

Lavoie vs Bigwood, 457 Fed2d, 713,(CCA 1, 1972.)

It is clear that this monopoly position held by the defendant company, confers a mutual benefit upon both. The defendant is guaranteed a viable rate of return by the State and is permitted to operate without competition. In return the State derives direct tax revenues, gross earnings revenues, expense sharing revenues, and the people of the State benefit from the efficient operation of the utilities.

6. Complaint, App. Doc. No. 1, Count 1, paragraph 8-i, page 4, alleges that the State shall apportion and assess 56% of its expenses . . . up to $600,000.00 for any fiscal year, between certain utilities. In their answer, defendants deny this, but again, for the purposes of the Motion To Dismiss, thisallegation must be assumed to be true. See also Connecticut General Statutes §16-49. In their brief, however, defendants admit that they do pay a proportinate share of the 56% of the P.U.C. expenses. Contrary to the assertations of the defendants the part time cab driver is not subject to this expense sharing arrangement. (Def. Br. p. 12.) C.G.S. §16-49 limits the utilities liable for this expense sharing arrangement to certain Public Service Companies as defined by C.G.S. §16-1 . Taxi cab companies are not included in the definition of Public Service Companies set forth in C.G.S §16-1. Even Motor Bus companies were not included until October 1, 1973, subsequent to the date of this action. Connecticut P.A. 73-267.

These proportinate share of the expenses of the P.U.C., which in turn regulates and controls those paying 56% of its expenses, are paid in addition to Corporate Business Tax, (C.G.S. §12-213, et seq.), and the Gross Earnings Tax, (C.G.S. § 12-256, et seq.)

This requirement was enacted as Public Act. No. 182 in May 1953. The purpose of the act was to eliminate the cost of the Public Utilities Commission to the State, and to keep the budget as low as possible and to relieve expenses carried by the General Fund. See Joint Standing Committee Hearings, Finance, Vol. 1,(p 1-249), pages 84, 85 and 86; Connecticut General Assembly, 1953, H.B. No. 1324, February 26, 1953. At these hearings Rep. Pruyn, Colebrook, stated,". . . I understand the public service companies are agreeable to this". See also, H-14, Connecticut General Assembly, House of Representatives Proceedings, April 7, - April 27, 1953; Vol 5, Part 3, Pages 888, 889. (These pages at the top also bear the notation pages 892 and 893.) H.B.1324, Cal. 551, File No. 347: Also, Connecticut General Assembly, Senate Proceedings, April 17, - May 7, 1953; Vol 5,Part 3, Pages 904 and 905, H.B. 1324.

Thus, the stated purpose was to relieve the General Fund from paying the expenses of the Public Utilities Commission, and the utilities themselves were agreeable to this proposal.

In Burton vs Wilmington Parking Authority, Supra, on p. 723, citing Cooper vs Aaron, 358 U.S.1,4, (1958), stated that the concept of state responsibility was interpreted as necessarily following upon "state participation through any arrangement, managment, funds or property."

The Supreme Court also found that the expense contribution by Eagle to the Parking Authority in Burton, Supra, was the significant factor in establishing the nexus between the private individual and the State.

In view of the above, it is beyond question that the plaintiff has made sufficient showing of "State Action". For the purposes of the Motion To Dismiss, all of the well pleaded material allegations are presumed to be true. Cruz vs Beto, Supra. All of the indicies for a finding that the utilities operating in Connecticut operate under color of law, exist and are alleged in plaintiff's complaint.

B. The Supreme Court In Considering The Matter Of Jackson vs Metropolitan Edison Company, Did Not Take Into Account Any Expense Sharing Statute That May Exist In The State Of Pennsylvania.

The District Court in its ruling on defendants' Motion To Dismiss Upon Reconsideration, stated on page 6, "Without specially alluding to this financial interdependence, the Supreme Court in Jackson found the symbiotic relationship present in Burton absent between the Metropolitan Edison Company and the Pennsylvania Public Utilities Commission". The Court at that time also stated that Pennsylvania has a statute similiar to C.G.S.§16-49 providing for the assessment of regulatory expenses upon public utilities, to wit; Pennsylvania Statute 66§1461.

Plaintiff respectfully submits that whatever effect Penn. Stat. 66§1461 had between Metropolitan Edison Company and the Pennsylvania Public Utilities Commission the time Mrs. Jackson's cause of action arose, and whatever the present Penn. Stat. 66§1461 means to the relationship between the public utilities operating in Pennsylvania, and the Pennsylvania Public Utilities Commission, (the statute was substantially amended shortly after Mrs. Jackson's utility service was terminated), is irrelevant as far as being precedent for a finding of "State Action " in this case is concerned.

A careful reading of the Complaint in the Jackson case, fails to disclose any mention of the expense sharing arrangement or Statute 66§1461, that Judge Zampano felt was considered by the Supreme Court when they found no symbiotic relationship between Metropolitian Edison Company and the Pennsylvania Public Utilities Commission. Since Mrs. Jackson failed to plead the existence of this Statute, or its effect on her claim of "State Action" by Metropolitan Edison Company, it is axiomatic that the Supreme Court could not find for her on this index of state action. It is basic law that a person may not recover upon facts not pleaded. In United Transportation Union vs Michigan, 401 U.S. 576, 28 L. Ed2d 339, 91 S. Ct. 1076, the Court held, (4) " A decree must relate specifically and exclusively to the pleadings and procf."

Nor do we find any mention of Penn. Stat. 66§1461 in any of the several briefs filed by Mrs. Jackson's counsel or briefs of Amicus Curiae. See plaintiff's Exhibit A, this brief, for copies of the record and briefs in the Jackson case in the Supreme Court.

Inasmuch as Mrs. Jackson did not plead or argue this point, she could not recover on this point in the District Court, The Appellate Court or in the Supreme Court.

In United States vs Miller Brothers Construction Co.,507 Fed2d, 1031, (CCA 10, 1974) the Court held (5) "Parties to action are entitled only to a determination of issues raised before the court".

Since Mrs. Jackson never raised the issue of joint participation through whatever provisions may have existed under Penn. Stat. 66§1461 between Metropolitan Edison Company and the Pennsylvania Public Utilities Commission, she could not have a determination on this important point. And logically, the Supreme Court could find no showing of any symbiotic relationship in her case between the utility and the regulatory body. Therefore, plaintiff respectfully submits that it was error for the District Court to assume that the Supreme Court found that an expense sharing arrangement did not constitute "State Action" in Pennsylvania, when the Supreme Court obviously did not even consider this aspect.

In view of the above it is plain that the holdings on expense sharing arrangements set forth in Burton, Supra, constituting "State Action", have not been disturbed by the ruling in Jackson, Supra, and that plaintiff's Complaint under 42 U.S.C.§1983 should not have been dismissed.

Mrs. Jackson argues in her brief to the Supreme Court that the Commonwealth of Pennsylvania has a direct financial interest in the revenue of the respondent. (Plaintiff's Exhibit A-2). Mrs. Jackson further argued that the Respondent corporation pays corporate net income taxes and capital or franchise taxes, as do other Pennsylvania corporations, it also pays an additional and unique tax, i.e., the Utilities Gross Receipts Tax, 72 Penn. Stat. Anno. § 8101. Mrs. Jackson also argued that this Utilities Gross

receipts Tax is no different than the five percent of gross profits tax paid to the City of Saint Paul by the Northern States Power company in Ihrke vs Northern State Power Co., Supra. As in Ihrke, such an arrangement makes the State a "direct beneficiary" of the utility's business, especially since the State had the power to set the utility's rates and to regulate its operations.

Plaintiff admits that in Connecticut, that as a matter of practice, the State does not set the utility's rates, although it has the power to do so. See C.G.S. 16§19. The utility also has the burden of proving that its rates are reasonable. See C.G.S. 16§22.

Defendants claim in their brief, (Def. Br. p.15.) that Ihrke, Supra, was vacated on appeal, and that therefore, the findings therein do not lend support to plaintiff's proposition. In Ihrke, Supra, the Court found "State Action" because Northern States Power Company paid 5% of its gross profits to the City of Saint Paul, thereby making the State a direct beneficiary. However, subsequent to this, the Ihrkes moved. Respondents persuaded the Supreme Court that the issue was then moot, and the case was vacated as being moot, not as defendants claim, because the Supreme Court disagreed with the Appellate's Court finding of "State Action". See 409 U.S. 815, 34 L. Ed2d 72.

It is apparent that the Penn. Gross Receipts Stat. 72 § 8101, et seq., is similar to Connecticut General Statutes 12§§256-258. Under the provisions of this gross earnings tax, telephone companies pay 6% of their gross earnings. This is in addition to other taxes, and in addition to the expense sharing contributions set forth in C.G.S. 16§49. Therefore, in Connecticut, as in Saint Paul and as in Pennsylvania, the State is a direct beneficiary of the utility's business.

The defendants in their brief. (Def. Br. p. 13) argue that the State is not a direct beneficiary of the defendant's actions. While much of their argument is based on evidentiary considerations that should properly be brought before the District Court for consideration, taking into account the size of the defendant corporation and its potential earnings, there can be no doubt that the contributions made by the defendant corporation to the State under the provisions of C.G.S. 12 §§ 256 and 258, and C. .S. 16§49, have a direct and substantial effect on the Public Utilities Commission and the State benefits very well from these contributions. If the defendant's revenues go down, due to uncollectible accounts, then it follows that the amounts received by the State will go down. Carried further, if the defendant corporation's revenues go down sufficiently so that it had no contributions to pay, while the other utilities under C.G.S. 16§49 would have some increased burden, certainly the total budget of the P.U.C. would be affected. Operating expenses and services would have to be cut. The State would lose its benefits derived from the contributions of the defendant corporation.

Therefore, the expense sharing arrangement mandated by Statute in Connecticut, requires a finding of State Action in the conduct of public utilities operating in Connecticut. Since the Supreme Court did not consider the similar Statute in Pennsylvania, their decision in Jackson, Supra, should not be considered as controlling here.

C. The State Of Connecticut Is Directly Involved In The Challanged Termination Procedures Employed By The Defendant Corporation.

The plaintiff in his complaint, alleges not only that the defendants operate

their affairs and activities pursuant to an extensive and comprehensive regulatory scheme which regulates and controls every aspect of its activities and operations, (Compl., App. Doc. No. 1, Count 6, pages 2 and 3 - Admitted by defendants in their answer), but said complaint further alleges, inter alia, that the P.U.C. of the State of Connecticut is duly authorized and empowered to further regulate and control the affairs, operations and activities of the defendant, S.N.E.T.CO by (a) Regulate the rates schedules and operations of all public utilities, (b) Require the filing and approval of rates, schedules, contracts, agreements, company rules and regulations, as a condition precedent to operation, (c) Prescribe the rates, service and conditions of service for single persons, and (e) Regulate and control the activities and affairs of public utilities, including the defendant, S.N.E.T.CO., with respect to customer deposits for service and the return thereof, and the conditions under which the utility may terminate service to its customers.

For the purposes of the Motion To Dismiss, all of these allegations are presumed to be true. Cruz vs Beto, Supra.

The case at bar, and the Jackson case have one significant difference. In the Jackson case, an evidentiary hearing was held. No evidentiary hearing was held here, and the Motion To Dismiss must be decided upon the allegations of the Complaint. The defendants in their brief, (Def Br. p. 10.) argue that their Tariffs were given passive approval before the P.U.C., and were never the subject of any hearing, that the State has placed no imprimatur to their termination tariffs, etc.

However, the defendants have not offered any evidence of these facts either in the District Court which is the proper place to present these claims,

or before this Court. At the District Court level, defendants have refused and failed to answer interrogatories that would shed light on the true relationship between the defendant utility and the actions of the P.U.C. Plaintiff respectfully submits that on the basis of this, it was error for the District Court to act on speculation and no evidence. The District Court was bound to act on the allegations of the Complaint, since no evidence was before it. Instead, it speculated that the P.U.C. only took a passive role in acting on defendant's tariffs. (Emphasis added.)

Further, it is undisputed that the public utilities operating in Connecticut pay 56% of the expenses of the P.U.C. In the plaintiff's affidavit, (App. Doc. No. 35, p. 4) it is shown that during the fiscal year 1973 - 1974, which is basically the year involved in this dispute, the expenses of the P.U.C. amounted to $1,190,216.56. The 56% share payable by Connecticut utilities amounted to $666,521.27 of which the defendant corporation paid, in addition to all other taxes, the sum of $230,195.08. Thus it is evident that the defendant corporation itself paid over 19 and 1/3 % of the expenses of the P.U.C. that year. Over $230,000.00 to the arm of the State that regulates and controls all of its operations and activities, including its termination procedure. If a complaint is made to the P.U.C. under C.G.S. 16§20, 56 % of the expenses of the investigating body are paid for by the utilities. For any complaints made against the defendant utility during that year under C.G.S. 16§20, the utility paid over 19 1/3% of all expenses connected with that investigation. The defendant corporation during that year paid over nineteen and one-third percent of all expenses of the P.U.C. that regulated and controlled it and gave approval to its tariffs and operations.

It is beyond question, that in Connecticut, due to the Gross Earnings Tax imposed on public utilities, and the expense sharing arrangements with the State regulatory and investigatory body, the State is inextricably entwined and involved not only in the termination procedures of the utilities, but in all of their daily operations and activities.

A similar example of State participation with a private utility was reported in Limuel vs Southern Gas Company, 378 F. Supp., 964, (W.D. Tex-1974) On page 967, the Court found that the defendant, Southern Union Gas Company, paid the sum of $1,250.00 in cash, plus 2% of its gross receipts, to the City of Austin, Texas. Thus, the Court declared, the City was both a "joint participant", and a "direct beneficiary" of defendant's business. The Court further found that this relationship of interdependence brought the case within the purview of Evans vs Newton, Supra. The Court went on to note that there was an impressive body of case law finding the operation of a public utility under similar or less compelling facts to be "State Action" and "under color of State law". Limuel, Supra, at p. 968, citing the following:

Palmer vs Columbia Gas of Ohio, Supra;

Ihrke vs Northern States Power Co., Supra;

Salisbury vs Southern New England Telephone Co., 365 F. Supp., 1023;(1973)

Bronson vs Consolidated Edison Co. of N.Y., Supra;

Hattell vs Public Service Co. of Colorado, 350 F. Supp.,240;(D. Colo,1972)

Stanford vs Gas Service Co., Supra;

The defendants admit in their brief, (Def. Br. p. 11), that in some cases seemingly private conduct will be considered "State Action". They cite Burton vs Wilmington Parking Authority, Supra, at page 725, "Where the State has so far insinuated itself into a position of interdependence with private organizations that it must be recognized as a joint participant in a challanged activity".

Plaintiff submits that in view of all of the known facts in the case at bar, this principal must be controlling here. All of the pleadings, and all of the known facts, dictate that the Courts must find that "State Action" is present in all of the activities of public utilities operating in the State of Connecticut, and that the State is a joint participant in the challenged termination procedures.

As the Hon. Mr. Justice Clark stated in Burton, Supra, on page 722, "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance".

Taking the known facts, and taking the allegations of the complaint as true, as is required, and weighing and sifting these facts, plaintiff submits that not only was it error for the District Court to assume on speculation that the plaintiff could prove no set of facts in support of his claim, but that it was also error for the District Court to hold that the conduct of public utilities operating in the State of Connecticut cannot be considered "State Action", within the purview of 42 U.S.C.§1983.

All of the arguments taken together, all of the allegations of the Complaint, all of the State's all of the known facts, sifted and weighed,

can lead to only one conclusion. The defendant Southern New England Telephone Company is a privately operated public utility subject to an extensive and comprehensive regulatory scheme that pervades each and every aspect of its daily operations and affairs. A substantial part of the expenses of this regulatory arm of the State are paid for directly by the defendant in an expense sharing venture that directly benefits both parties. The defendant contributes substantial sums to the general fund by way of gross earnings taxes and corporate business taxes, which funds are used to defray the balance of the expenses of the regulatory agency. The State grants the utility a monopoly to do business, grants them a guaranteed rate of return by approving their rates and tariffs, for which the utility carries out a public function of a governmental nature, furnishing the people of the State a communication network, reasonable good and efficient telephonic service. The defendant corporation terminates service to those it feels like, without notice, hearing or opportunity to be heard or to dispute charges. It does this with the blessings and approval of the State regulatory commission, whose expenses, and even whose very existence is dependent on the revenues and contributions of the regulated utilities. All of these facts show an interdependence and entwinement between the State and the public utilities, and the defendant corporation in particular that cannot be classified other than "State Action".

Clearly, it was error for the District Court to have found otherwise. Had the District Court held an evidentiary hearing prior to dismissal, all of the factors related above could have been brought out in stark reality.

Therefore, plaintiff urges this Court to remand this case back to the District Court for appropriate proceedings.

ARGUMENT

III

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S CONSPIRACY CLAIMS PRIOR TO THE COMPLETION OF DISCOVERY AND WITHOUT AN EVIDENTIARY HEARING.

A. Plaintiff's Allegations Of Conspiracy To Deprive Him Of His Constitutional Rights Are Sufficient Under The Law.

The defendants in their brief, (Def. Br. p. 17,), argue that plaintiff has failed to allege certain elements requisite for a showing of a viable complaint under 42 U.S.C. §1985, and in effect, the companion Statute, 42 U.S.C. § 1986. They cite the Supreme Court case of Griffin vs Breckenridge, 403 U.S.88; 29 L. Ed2d. 338; (1971). They admit that plaintiff, for the purposes of the appeal successfully alleges all of the necessary elements except (2) which states: " The defendants did . . . for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the law . . . ;"

Plaintiff respectfully disagrees that he has failed to allege these elements defendant claim are the exception. A careful reading of the Complaint shows beyond question that plaintiff has alleged all of the required elements, if indeed such detailing is required under case law.

Plaintiff's Complaint, App. Doc. No. 1, Count 3, paragraph 9, pagell, refering to Count 1, paragraph 9 page 4, alleges that the defendants . . . have subjected plaintiff, and other citizens, customers of the defendant,

Southern New England Telephone Company, to a pattern of conduct consisting of terminating telephone service . . . without notice or hearing . . . thereby depriving plaintiff and other citizens, customers of said defendant, of the rights, privileges and immunities guaranteed to plaintiff and other citizens, under the Constitution and Laws of the United States. Paragraph 21, page 11, further alleges that the acts complained of were done to deny plaintiff the equal protection of the laws, and done with the intent to deny plaintiff the equal protection of the laws and to injure plaintiff for lawfully attempting to obtain his rights under the Constitution and laws of the United States.

Thus, it is clearly seen, that plaintiff has alleged each and every element set forth in Griffin. Plaintiff alleges that he personally, and that he as a member of a class, i.e., citizens and customers of S.N.E.T.CO, who have had their service terminated without notice and hearing, and that the defendants have carried out their conspiracies with the intent to deny and deprive plaintiff and the class of their guaranteed rights and privileges. Therefore, the necessary elements cited in Griffin, Supra, have been alleged, to wit; Purpose or intent to deny a person and a class of persons, the Constitutionally guaranteed rights enjoyed by all. Plaintiff further alleges intent to deny equal rights and privileges and immunities. He alleges a conspiracy aimed at the deprivation of the equal enjoyment of rights secured by the law to all. Arnold vs Tiffany, 487 Fed2d 216, (CCA 9, 1974) at page 218, citing Griffin, Supra, at page 101 - 102.

In Griffin, Supra, at page 100, the Court stated, " The object of the amendment is . . . to confine the authority of this law to the deprivations which shall attack the quality of rights of American citizens; that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens rights, shall be within the scope of the remedies of this section".

As the Court further stated in Griffin, Supra, at page 96, "Little reason remains, therefore, not to accord to the words of the statute their apparent meaning".

Taking all of these allegations in the Complaint as true, as is required under a Motion To Dismiss, it is patent that the plaintiff has made the required showing of a personal, and a class based invidious discriminatory animus that entitles him to relief. See Westbury vs Gilman Paper Co., 507 Fed2d.206, (CCA 5, 1975); O'Neill vs Grayson County War Memorial Hospital, et al, 472 Fed2d. 1140,(CCA 6, 1973); Richardson vs Miller, 446 Fed2d. 1247, (CCA 3, 1971).

Further, as mentioned earlier in this brief, it was clear error for the District Court to dismiss this portion of plaintiff's Complaint without notice and hearing. Literature, Inc. et al. vs Quinn, Supra.

B. Plaintiff Successfully Alleges The Necessary Elements To State A Cause Of Action Under 42 U.S.C. § 1985 (2).

Plaintiff in his complaint, App. Doc. No. 1, Count III, pages 11 & 12, alleges that the defendants, and each of them, acting separately and in concert,

have hindered, obstructed and delayed plaintiff in the prosecution of his lawsuit with the intent and purpose of defeating the due course of justice and of denying and depriving him of the equal protection of the laws, and depriving him of the rights, privileges and immunities secured to him under the Constitution and Laws of the United States. Further, he incorporates by reference all of the previous allegation set forth in Count I with reference to being a member of a class that has been discriminated against.

Defendants argue that this subsection implies that the conspirators were operating with a discriminatory, class-based motivation, and cite Griffin, Supra, for authority.

Plaintiff submits, that if such is indeed the requirement, he has sufficiently alleged facts showing him entitled to relief. However, plaintiff disagrees that Griffin is any authority for this proposition. Griffin is authority only for actions brought under 42 U.S.C.§ 1985 (3) only. Nowhere in Griffin is 42 U.S.C.§1985 (2) mentioned, or implied.

Further, as stated in Griffin, Supra, at page 97. "... The Civil Rights Statutes should be accorded a sweep as broad as their language".

Plaintiff respectfully submits that it was error, therefore, to dismiss plaintiff's claims under 42 U.S.C.§1985 (2).

Since 42 U.S.C.§1986 is dependent upon 42 U.S.C.§ 1985, it is submitted that if he is entitled to proceed on his claims under 42 U.S.C.§1985, he is likewise entitled to proceed on his claims under 42 U.S.C.§1986.

And further, since the District Court gave no notice or opportunity for hearing on plaintiff's claims under 42 U.S.C.§1986, when it dismissed these claims, it was error to do so, and the plaintiff is entitled to have these counts remanded to be proceeded in in accordance with law.

CONCLUSION

The plaintiff respectfully submits that this Court should remand this case back to the District Court to proceed in accordance with law. Plaintiff further urges the Court to find that public utilities conduct their daily activities under color of law in the State of Connecticut, on the grounds that the issue of joint venture under expense sharing arrangements and Statutes was not considered by the Supreme Court in the Jackson case, and that therefore, the Jackson case can be considered as controlling in Connecticut, inasmuch as the material issues presented are not the same.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DAVID L. SALISBURY	)	
Plaintiff - Appellant	)	CIVIL APPEAL
vs	)	NO. 75-7324
The SOUTHERN NEW ENGLAND TELEPHONE	)	
COMPANY, INC., and WILLIAM J. O'KEEFE	)	
Defendants - Appellees	)	

CERTIFICATION OF SERVICE

This is to certify that on January 27, 1976, I deposited two copies each of my reply brief and exhibits, in a sealed envelope, postage prepaid, at the Post Office, at Waterbury, Connecticut, addressed to Peter J. Tyrrell, Esq, of Griffin & Brayton, Esqs, 49 Leavenworth Street, Waterbury, Connecticut,06702, attorneys for the defendants in the above captioned appeal.

Respectfully submitted,

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